The Commonwealth of Massachusetts
JOINT COMMITTEE ON TELECOMMUNICATION, UTILITIES AND ENERGY
STATE HOUSE ROOM 473-B
BOSTON 02133-1053

Michael W. Morrissey
Senate Chairman

Barry R. Finegold
House Chairman

April 17, 2009

Mr. Philip Giudice – Commissioner
Department of Energy Resources
100 Cambridge St., Suite 1020
Boston, MA 02114

RE: REPORT OF THE COMMITTEE ON PROPOSED FINAL REGULATIONS TO RENEWABLE AND ALTERNATIVE ENERGY PORTFOLIO STANDARDS (225 CMR 14.00, 225 CMR 15.00, AND 225 CMR 16.00)

Dear Commissioner Giudice:

First, we would like to take this opportunity to express our appreciation to you and your dedicated staff for your work thus far implementing the Green Communities Act of 2008. We applaud your continued dedication to the promotion and development of renewable and alternative energy resources. Pursuant to Section 12 of Chapter 25A of the General Laws, the Joint Committee on Telecommunications, Utilities and Energy has reviewed the proposed final regulations implementing the Renewable and Alternative Energy Portfolio Standards (RPS and APS) as required by the Green Communities Act.

While the Committee shares your belief that these proposed regulations will provide significant assistance to the Commonwealth in meeting its renewable and alternative energy goals, we respectfully bring to your attention several issues the Committee has encountered during its investigation.

A. CLASS II ALTERNATIVE COMPLIANCE PAYMENT

As you know, in enacting the Class II RPS, particularly as it applies to existing wood-fueled renewable generating sources, we envisioned the encouragement of existing technologies and the continued operation of existing wood-fueled renewable generating sources by requiring those eligible wood-fueled generating sources to invest in additional air emission control equipment to further reduce air emissions.

With the current uncertainty in the financial markets, and the effect it may portend for the near term development of new renewable generators, now more than ever, it is important that we maintain operating existing Class II wood-fueled renewables and seek to achieve reasonable regional air emission reductions from such facilities. We commend the work DOER has done in holding stakeholder meetings, a public comment process, and working diligently to produce a proposed final rulemaking to implement the Class II RPS for non-waste renewable generators ("Class II NW RPS"), and the other RPS amendments arising from the Green Communities Act.

Concerns have been brought to the Committee's attention, however, that the Class II RPS proposed final rulemaking will fall short of intended goals because the initial alternative compliance payment ("ACP") of $25 appears to be set too low to produce a price range for the resulting renewable energy certificates ("REC") that will encourage or even allow participation in the Class II RPS by many of the region's existing wood-fueled renewables.

Given these concerns, we respectfully request that DOER re-evaluate whether the $25 ACP will produce RECs at a level adequate to meet the above goals, or whether that amount should be raised. In that regard, the committee is aware that DOER provided a February 5, 2009 statement explaining the basis of its determination of the Class II RPS generation minimum standard percentage, but have not seen any similar statement explaining the basis for the $25 ACP and the expected resulting REC prices. We hope that such an analysis could be provided.

B. HYDROELECTRIC POWER

a. Low Impact Hydropower Institute

During the legislative hearings and throughout the debate, there was a great deal of testimony and discussion concerning the comprehensive nature of the existing federal and state regulatory frameworks governing the permitting and operation of new or improved hydroelectric facilities in the United States. Many felt that following the changes to Federal Energy Regulatory Commission ("FERC") regulations mandated by the Electric Consumers Protection Act of 1986 ("ECPA"; 16 U.S.C. § 791a), the regulatory framework governing the licensing and other permitting of hydro facilities in the US already embodied the standards we hoped to set forth in the GCA. Even a cursory reading of the relevant FERC regulations gives ample evidence that the "relevant state and federal agencies having oversight and jurisdiction over hydropower facilities" have been granted what the FERC refers to as "mandatory conditioning authority". Furthermore, we believe that the Section 401 powers granted the states may more than meet the Legislature's standards established by this Act.

It is our understanding that the "relevant state and federal agencies" have already been consulted in the process of any post-ECPA FERC licensing or permitting of a hydropower facility or improvement at a facility. The record of that consultation and the operating conditions resulting from it are detailed in facility's application documents and FERC's licensing and permitting orders, respectively. At one committee hearing we recall one hydro owner producing upwards of 10 three-inch binders of documentation that FERC requires be submitted for licensure. Further, federal court cases of the mid 1990's clearly establish the mandatory

conditioning authority of state water quality agencies over water quality issues affecting facilities seeking FERC authorization.

As all US based hydro resources seeking certification as Class I renewable energy resources will, by definition, have come into being since 1998; they necessarily will have been subjected to the rigorous regulatory process prescribed by the post-ECPA FERC frameworks, and will be in compliance with all of the standard and special conditions contained in their FERC authorizing documents. Certification by the FERC that such facilities are in compliance should suffice to show that they meet the guidelines contained in the GCA. Additionally, all Class II hydro resources in U.S. that applied for and received licenses or other permitting approval from FERC under its post-ECPA regulations, would also have gone through the same strict requirements as mentioned above.

The committee has been hearing concerns regarding review authority granted to any self-constituted, non-governmental, quasi-regulatory organization, such as the Low Impact Hydropower Institute which is currently referenced. It is our understanding that on February 26, 2009, you testified in front of the U.S. Senate Committee on Energy and Natural Resources regarding the use of energy in buildings. In this testimony you spoke of the International Codes Council (ICC) and American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) as "non-profit" membership organizations, essentially private, unelected, undemocratic bodies". Along those same lines, we are concerned that the regulations as promulgated by DOER put certification of REC's for hydro facilities into the hands of a third party, non-profit, non-governmental agency much like ICC and ASHRAE.

b. Incremental Hydropower resulting from an efficiency improvement

The Green Communities Act defines "incremental hydroelectric power" to include the power increase at an existing hydropower facility from, among other sources, an efficiency improvement. Under the Green Communities Act, post-1997 incremental hydropower output not exceeding 25 MWs resulting from an efficiency improvement could be eligible for the Class I RPS if DOER determines that *the improvement* meets certain "appropriate and site-specific standards" addressing, e.g. river flow, water quality, and fish passage in the "impacted watershed." That is, DOER is to consider "appropriate and site-specific" standards based only on the impact to the watershed from the efficiency improvement. The committee has heard concerns that the proposed regulation at 225 CMR 14.05(1)(a)(6)(d), however, subjects the entire "unit" or generating facility to the watershed impact analysis.

Given these concerns, we respectively request that the hydropower regulations are reviewed to determine whether Class I RPS eligibility of incremental hydropower due to an efficiency improvement should be based on an evaluation of, and the evaluation is to only address, the improvement's new watershed impact, if any, rather than the watershed impact of the entire facility. Further, we request that DOER consider that if the efficiency improvement was accomplished with no new watershed impact, then eligibility should be granted without further site-specific standards.

C. LANDFILL GAS

We are respectfully questioning the Department's treatment of landfill gas resources outside the adjacent control areas to ISO New England. As you know, the proposed final regulations restrict eligible Class I landfill methane gas resources to those solely in the ISO control area or an "adjacent" control area. We therefore reasonably assume that "adjacent" control areas include only the NY ISO, New Brunswick and Quebec.

Landfill methane gas is an important domestic clean renewable fuel that can serve as an important bridge to meet existing and near term renewable resource requirements at least until additional renewable supplies can be built to meet future needs. Its importance as a domestic resource could displace foreign and domestic fossil fuels. Significantly, landfill methane gas is available today to supply existing and future Massachusetts natural gas-fired, biomass and plasma gasification facilities. Massachusetts consumers will benefit from an increased supply of clean domestic renewable resources.

Other New England states appreciate that landfill methane gas is monitored, controlled and accounted for in same manner whether it enters in New England, or in an "adjacent" system or beyond. As a further safeguard, the proposed regulations allow the Department to review documentation to ensure that resources eligible for renewable portfolio credits only receive credits provided such power is delivered to Massachusetts consumers.

We feel that it is important, given our increased renewable energy mandates, that we continue to seek out all available sources of energy as we continue to foster development here in the Commonwealth.

D. ALTERNATIVE PORFOLIO STANDARD DEFINITIONS

The Act envisions the commercializing of technology that can accomplish the catalytic gasification of coal, petroleum coke and other carbonaceous materials (including biomass) into methane suitable for transportation in the interstate natural gas pipeline system. Qualifying facilities would have to also accomplish the capture and sequestration of carbon dioxide produced in the gasification process.

The Committee is concerned that two definitions in the regulations, as proposed, would create confusion and potential unintended obstacles to the qualification of some of the fuel produced by gasification facilities. We respectfully request that these definitions be revised to alleviate these potential problems and enable achievement of the clear intent of the Act.

The definitions that, in our view, need correction are as follows:

a. Definition of "Commercial Operation Date."

We agree with the Department's view that in order to qualify for the APS, a gasification facility must have gone into service after January 1, 2008. The Act is designed to encourage the development of new technologies, and it is therefore appropriate that only newly developed gasification facilities be eligible for the APS. However, in the case of "Commercial Operation

Date," the Department's definition seems to preclude the possibility that an APS-eligible fuel from gasification could be used at a Generation Unit with an in-service date earlier than January 1, 2008. We respectfully note that the relevant date is the in-service date of the Gasification facility, not the Generation Unit. Accordingly, we believe that the definition of "Commercial Operation Date" should be revised to read as follows:

> "Commercial Operation Date. Except in the case of a Generation Unit that uses fuel produced from a Gasification facility, the date that a Generation Unit first produces electrical energy for sale within the ISO-NE Control Area or within an adjacent Control Area. In the case of a Generation Unit that uses fuel produced from a Gasification facility, the date that the Gasification facility first produced gas. In the case of a Generation Unit that is connected to the End-use customer's side of the electric meter or produces Off-grid Generation, the date that such Generation Unit first produces electrical energy."

b. Definition of "Gasification."

It is our understanding that the catalytic gasification process works with a number of carbonaceous feedstocks, including by-products of petroleum refining, such as petroleum coke. The Act clearly did not intend to preclude the fuel derived from the gasification of this feedstock from qualifying for the APS. The Act provides in Section 11F(c) that "the following technologies shall not be considered alternative energy supplies: … petroleum coke, except when used in gasification."

While we feel that the Department correctly implemented this direction in its definition of an "APS Ineligible Fuel," it neglected to do so in its definition of "Gasification." That latter definition currently reads: "A process in which a fuel, *excluding petroleum-derived fuel*, is converted to a gas…" (emphasis added). To correct this oversight, we respectfully suggest that the definition of "Gasification" should be revised to remove the phrase "excluding petroleum-derived fuel."

E. DEFINITION OF "INCREMENTAL ELECTRIC ENERGY"

In 225 CMR 16.05:(1)(a)2.b.ii DOER includes a formula for determining APS alternative energy attributes for existing combined heat and power units. The formula requires determination of Incremental Useful Thermal Energy and Incremental Electrical Energy, with figures expressed as a positive number (when the incremental amount is greater than before) or a negative number (when the incremental amount is less than before). This approach is logical and will eliminate manipulation of the formula to increase APS eligibility.

However, we feel that the current definition of "Incremental Electrical Energy" may result in the formula producing negative consequences that discourage unrelated environmental improvements which may decrease electricity output. For example, a combined heat and power unit may make equipment changes that reduce air emissions but which also decrease the amount of electrical energy generated. In this example, the decrease in electric energy generated is not related to the production of useful thermal energy. Nevertheless, this decrease in generation

would result in a decrease in the number of APS alternative energy attributes for which the unit is eligible.

If the decrease in electric energy generated is the result of previously approved equipment or operational changes that produce environmental benefits and that are not required by state or federal law or regulation, then for the purposes of determining the APS alternative energy attributes, the number used in the formula to determine Incremental Electrical Energy should be zero rather than a negative number.

Accordingly, we believe the definition of "Incremental Electrical Energy" should be revised to read as follows:

> "Incremental Electrical Energy. Electric energy generated by a CHP unit that is either greater (expressed as a positive amount) or less than (expressed as a negative amount unless such decrease is the result of previously approved equipment or operational changes that produce environmental benefits and that are not required by state or federal law or regulation) the electric energy generated by the CHP unit prior to the addition of new electric generation nameplate capacity, Useful Thermal Energy, or Incremental Useful Thermal Energy."

F. PUBLIC COMMENT PROCEDURES

Under current RPS Class I regulations, DOER is required to provide an opportunity for public comment on applications for a Statement of Qualification if the Generation Unit would:

1. use an Eligible Biomass Fuel and is not required to have a Valid Air Permit;
2. co-fire an Eligible New Renewable Fuel in a Generation Unit in conjunction with ineligible fuels;
3. use an Eligible Biomass Fuel in conjunction with a Vintage Waiver.

DOER currently has the discretion to provide for public comment with regard to applications that do not fall under the above categories. Under the new regulations, the above requirement of mandatory public comment in those cases is removed, and DOER is granted the discretion as to whether to provide for public comment for all Statements of Qualification.

We have heard concerns that, due to this change, there may not be opportunities for public comment for some of the most controversial and complex applications. Due to these concerns, we respectively request that DOER reinstate its mandatory public comment procedure for the above categories.

CONCLUSION

Thank you for taking the time to consider and address the Committee's concerns through explanation, re-evaluation or revision of the proposed final regulations. Again, we would like to applaud the work of you and your staff in implementing this and many other important provisions of the Green Communities Act.

Sincerely,

Michael W. Morrissey
Senate Chairman

Barry Finegold
House Chairman